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# Criminal Procedure - Substitution of Judge During Trial - Reversible Error

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that interstate commerce must bear a tax load equal to that of its intrastate competitors should not unduly hamper the negotiation of interstate commercial relations.

*A. B. R.*

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CRIMINAL PROCEDURE—SUBSTITUTION OF JUDGE DURING TRIAL —REVERSIBLE ERROR—During a recent murder trial a special judge presided during the impanelling of the jury, and the regular judge returned to the bench for the remainder of the trial. Defendant was convicted and moved for a new trial. He assigned as error the substitution of judges. On appeal, *held,* new trial refused. The defendant failed to show that his rights were prejudiced by the error. *State v. McClain,* 194 So. 563 (La. 1940).

The courts in most states hold that a substitution of judges at any time after the jury has been accepted and sworn is reversible error.[1] Two reasons have been advanced by the courts in support of this conclusion: (1) the constitutional guaranty of trial by jury means trial by the identical judge and jury throughout;[2] (2) the practical argument that a judge who is not present during the entire proceedings will be unable properly to evaluate the evidence by simply scanning the record.[3] This latter argument appears to be the more reasonable and is the one most often advanced by the courts, especially in the recent decisions.

The principal case, however, presents a problem slightly different from that of substitution during the actual trial. The substitution in this case took place after the jury had been sworn but before any evidence had been produced. The court, although admitting for purposes of argument the possible irregularity of the procedure, yet refused to grant a reversal, and based its decision on Article 557 of the Code of Criminal Procedure.[4]

The conclusion of the Louisiana Supreme Court appears to be sound and is in line with the holdings in other jurisdictions.[5]

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1. Freeman v. United States, 227 Fed. 732 (C.C.A. 2d, 1915); Durden v. People, 192 Ill. 493, 61 N.E. 317 (1901); Mason v. State, 26 Ohio C.C.R. 535, 5 Ohio C.C.R. (N.S.) 113 (1904); Commonwealth v. Claney, 113 Pa. Super. 439, 173 Atl. 840 (1934); People v. McPherson, 74 Hun 336, 26 N.Y. Supp. 236 (1893); Blend v. People, 41 N.Y. 604 (1870); State v. Finder, 12 S.D. 423, 81 N.W. 959 (1900). Contra: State v. McCray, 189 Iowa 1239, 179 N.W. 627 (1920); People v. Henderson, 28 Cal. 466 (1865).

2. Freeman v. United States, 227 Fed. 732 (C.C.A. 2d, 1915).

3. Commonwealth v. Claney, 113 Pa. Super. 439, 173 Atl. 840 (1934).

4. See note 7, infra.

5. Commonwealth v. Thompson, 328 Pa. 27, 195 Atl. 115, 114 A.L.R. 432

The reasons behind the rule prohibiting substitution do not exist in the situation of the present case where the substituted judge takes the bench before any testimony has been offered. He hears all the evidence and misses no part of the trial which could have any substantial bearing on the guilt or innocence of the accused.

Not mentioned by the court, but seemingly relevant is the earlier Louisiana case of *State v. Barret*,[6] in which it was held that a substituted judge could pass sentence even though he was not present at the trial and no record was kept of the evidence. Apparently the point was not strenuously argued, and the court reached its conclusion with no comment.

Considering these two Louisiana cases together, a valid query may be raised as to what would be the attitude of the Louisiana courts toward a substitution of judges during the course of the actual trial. The answer to this question probably will be determined by the interpretation placed on Articles 557[7] and 508[8] of the Code of Criminal Procedure. Both of these Articles provide in substance that a new trial cannot be granted for each and every error which may occur during the course of the first trial. The defendant must show that failure to allow a new trial will result in a miscarriage of justice.[9] In the situation under consideration the court conceivably might hold that the substitution of judges during the course of trial is a procedure fraught with possibility of injury to the defendant, and that miscarriage of justice will be presumed.[10] The court was apparently unwilling

(1937). Cf. Meldrum v. United States, 151 Fed. 177, 10 Ann. Cas. 324 (C.C.A. 9th, 1907); Charles v. State, 4 Port. 107 (Ala. 1836); State v. Knotts, 70 S.C. 400, 50 S.E. 9 (1905); State v. Barret, 151 La. 52, 91 So. 543 (1922).

6. 151 La. 52, 91 So. 543 (1922).

7. Art. 557, La. Code of Criminal Procedure, reads as follows: "No judgment shall be set aside, or a new trial granted by any appellate court of this state, in any criminal case, on the grounds of misdirection of the jury or the improper admission or rejection of evidence, or as to error of any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, is prejudicial to the substantial rights of the accused, or constitutes a substantial violation of a constitutional or statutory right."

8. Art. 508, La. Code of Criminal Procedure: "The motion for a new trial is based upon the supposition that injustice has been done the accused, and, unless such is shown to have been the case, the application shall be denied, no matter upon what allegations grounded."

9. See Hebert, The Problem of Reversible Error in Louisiana (1932) 6 Tulane L. Rev. 169, 184.

10. This position has been adopted by the Louisiana Supreme Court with respect to erroneous rulings admitting or excluding evidence, and also with respect to comments on the facts by the court. Hebert, supra note 9, at 187, 193.

to adopt this view in the *Barret* case[11] where the substitution occurred after verdict. However, if the judge who attempts to instruct the jury was not present during the taking of testimony, he may well be unable adequately to state the law applicable to the facts of the case; particularly is this true in Louisiana where a transcription of the testimony is not required.

Most courts that hold a substitution of judges during the course of trial to be reversible error have emphasized the fact that a substituted judge who has had no opportunity to observe the demeanor of witnesses on the stand cannot adequately comment on the evidence to the jury.[12] This argument would have no weight in Louisiana since the trial court is precluded by law from expressing any opinion on the facts of the case.[13] The general problem presents a balance between the interest of the courts in the rights of the individual, on the one hand, and the desire for a speedy and efficient administration of the criminal law, on the other.

Although there is some authority to the contrary,[14] it is generally held that such right as a defendant may have against substitution of judges is a personal one and may be waived by him.[15] This view would probably be adopted by the Louisiana court.

*L. W. R.*

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LANDLORD AND TENANT—LESSOR'S LIABILITY TO THIRD PERSONS —DEFECTIVE PREMISES—In two recent cases, the wife of a lessee and the guest of a lessee were denied recovery for injuries received as a result of defects in the premises. In both instances, the lessor was not the owner of the building, and it was *held,* that the obligations imposed by Articles 2692 and 2695[1] run in favor of the lessee only. *Duplain v. Wiltz,* 190 So. 60 (La. App. 1940); *Graff v. Marmelzadt,* 194 So. 62 (La. App. 1940).

11. State v. Barret, 151 La. 52, 91 So. 543 (1922). While this case was decided before the Code of Criminal Procedure was adopted, Louisiana has long held that error without injury does not entitle the defendant to a new trial. See State v. Kennedy, 11 La. Ann. 479 (1856); State v. Kennon, 45 La. Ann. 1192, 14 So. 187 (1893); State v. Pascal, 147 La. 634, 85 So. 621 (1920).

12. Freeman v. United States, 227 Fed. 732 (C.C.A. 2d, 1915); Commonwealth v. Claney, 113 Pa. Super. 439, 173 Atl. 840 (1934).

13. Art. 384, La. Code of Criminal Procedure.

14. Freeman v. United States, 227 Fed. 732 (C.C.A. 2d, 1915); Commonwealth v. Claney, 113 Pa. Super. 439, 173 Atl. 840 (1934).

15. People v. Henderson, 28 Cal. 466 (1865); State v. Wood, 118 Kan. 58, 233 Pac. 1029 (1925); State v. McCray, 189 Iowa 1239, 179 N.W. 627 (1920).

1. La. Civil Code of 1870.